BEFORE INDEPENDENT HEARING COMMISSIONERS

UNDER	the Resource Management Act 1991 (RMA)
IN THE MATTER	of an application for various resource consents to undertake periodic openings of the Waituna Lagoon by Te Rūnanga o Awarua, the Department of Conservation and Southland Regional Council
APPLICATION	**APP-20242456**

LEGAL SUBMISSIONS ON BEHALF OF SOUTHLAND REGIONAL COUNCIL (AS CONSENT AUTHORITY)

31 July 2025

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MAY IT PLEASE THE PANEL:

1. These submissions are presented on behalf of Southland Regional Council (Environment Southland) in its regulatory capacity. The submissions address legal matters that have arisen during the hearing to assist the Panel with its decision-making.

2. These submissions address:

   (a) the scope for decision-making on the application;

   (b) the existing environment;

   (c) the proposed opening locations and related conditions;

   (d) effects on property values and compensation;

   (e) the relevance of Environment Southland's functions under the Soil Conservation and Rivers Control Act 1941 (**SCRCA**) and for flood control works; and

   (f) the ability for Environment Southland to open the Lagoon using emergency works powers, if the application is declined.

Scope for decision-making

3. Many submitters have sought a decision a consent is granted authorising (or requiring) opening of the Waituna Lagoon at levels of 2 or 2.2m. The Panel has asked all legal counsel whether it has jurisdiction to make such a decision, or if that would frustrate the application (which proposes an opening regime for ecological and cultural reasons).

4. Ms Williams submitted that authorising opening at lower levels was beyond the intent of the application. She argued that the previous resource consent enabled opening at 2.2m, which the Applicants considered did not work and were not pursuing.

5. Ms Cook-Munro took the contrary position and argued that a request to open at a lower level was not a surprise and a condition would be imposed for a lower level. Ms Cook-Munro refers to *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 and suggests a lower threshold is reasonably related to the proposed activity and not related to ulterior concerns.

6. It is a well-established principle that conditions cannot be imposed that would frustrate the grant of consent.[1] There is merit to the argument that authorising

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[1] *Residential Management Ltd v Papatoetoe City* A062/86 (PT).

(or requiring) opening at a lower level than sought by the Applicants would frustrate the grant of the consent that they are seeking.

7. However, in my submission, there is a more fundamental reason why there is no jurisdiction to impose lower opening thresholds than sought by the Applicants. The scope of an activity that requires resource consent is confined by the terms of the application – a consent cannot grant more than was applied for.[2] In this case, the Applicants have specifically pursued a resource consent open the Waituna Lagoon in accordance with prescribed triggers. Those triggers are not merely conditions that mitigate the effects of the activity[3] – they are the key way that the activity is constrained, and were the central focus of its effects assessment.[4]

8. To grant consent to allow opening at a lower level, would be to grant the Applicants greater access to the resource than they sought – they could take and divert more water from the Lagoon (and possibly more frequently) than sought in the application. A helpful way to conceptualise this is if the application were for a consumptive take and use of water for a productive activity (such as an irrigation scheme). If an applicant applied to take 100,000m^3 of water and assessed the effects of the application on that basis, it would not be open to the applicant (or any submitter on the proposal) to seek that resource consent ultimately be granted to take and use 150,000m^3.

9. Accordingly, in my submission, the Panel cannot grant consent authorising (or requiring) opening at 2 or 2.2m. The greatest extent of diversion that has been sought is at 2.3m – that is the "upper limit" of the activity that can be authorised.

10. In terms of the Panel's decision-making more broadly, the presentations by many submitters expressed concerns about the management of the Waituna Catchment and Lagoon generally, and various other alternative solutions were offered. While it may be trite to submit this to experienced commissioners, the Panel's decision-making function is limited to considering and determining the application before it. The Panel is not required to (and does not have the power to) attempt to solve wider issues relating to the integrated management of the complex environment that is the Waituna Catchment and Lagoon.

Existing environment

11. Under sections 104 and 104D, the Panel is required to consider the adverse effects of the proposal on the "environment". For the purpose of those statutory

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2 *Sutton v Moule* (1992) 2 NZRMA 41 (CA).

3 As Ms Sannazzaro seemed to suggest.

4 See Application at 3 Proposal, page 16.

tests, the “existing environment” is a legal construct that includes the environment as it is today and as it may be modified by permitted activities or resource consents that are likely to be implemented.[5] It does not include resource consents that have expired (or are expiring and being replaced),[6] nor does it include unlawful activities.[7]

12. For this application, the application of the “environment” is critical. The nature and scale of the effects of the proposal to open the Lagoon depend on the environment that the application impacts.

13. Many submitters have approached the application as though the “environment” includes the ability to open the Lagoon at levels like 1.8, 2 or 2.2m and that the effect of the application is to increase that level (or, in other words, to restrict the status quo).

14. While that conceptualisation is understandable given the long history of Lagoon management by the community, it is incorrect. No resource consent is currently held to open the Lagoon, nor is that authorised by a rule in plan, a national environmental standard or regulations. The “existing environment” is a catchment that terminates at a lagoon, which cannot lawfully be opened at any level (other than in accordance with emergency works powers).

15. This has important consequences for the submissions that argue that there will be unacceptable adverse effects from impeding drainage, reducing nutrient flushing or “drowning” vegetation. Those adverse effects are in the environment and are not a consequence of the application.

16. Ms Cook-Munro initially took the position that Ms Williams’ conceptualisation of the environment was “technically correct”, but that a “real world” lens meant the long history of opening should influence how the “existing environment” is applied. However, following questions from the Panel, Ms Cook-Munro appeared to accept that the “technically correct” conceptualisation was “legally correct” and the established principles in *Hawthorn* and *Ngati Rangi* must be followed.

Proposed opening locations

17. The Applicants have structured the application to seek authorisation to open the Lagoon at Walkers Bay (within identified coordinates) or at an alternative location anywhere along the coast adjoining the Lagoon, provided a risk assessment is undertaken and certified in accordance with the proposed

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[5] *Queenstown-Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299 (CA).
[6] *Ngati Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.
[7] *Scholfield v Auckland Council* [2012] NZEnvC 68 at [29].

conditions. The Panel has queried whether such an approach is lawful, including on the basis that it may be an unlawful delegation of decision-making that defers assessment of effects to a later date.

18. As an initial point, in my submission, it is sufficiently clear from the application that the Applicants sought such wide authorisation. The breadth of the alternative opening locations is described at a number of places in the "proposal" section of the application.[8]

19. In order for the Applicants' proposed approach to the opening location to be approved, there must be sufficient information to understand the effects of the opening locations and the relevant condition must be lawful.

20. In terms of the assessment of effects, an important consideration is that the Applicants are not seeking land use consents under section 9(3) of the RMA. Accordingly, the focus must be on the effects of disturbance of the Lagoon, the coastal marine area and the effects of diverting and discharging water. As a matter of logic, those effects will be the same or similar wherever they occur.

21. In terms of reservation of discretion, while a condition can leave certification to a delegate using that person's skill and experience, it cannot delegate the making of substantive decisions.[9] In previous cases, the distinction has been drawn between a condition that empowers a decision of a certifier (permissible) or an arbitrator (impermissible).

22. The opening location condition (condition 26) is unclear and could be improved. From the application and framing of the condition, it intends to be targeted at requiring certification that an alternative opening location is as effective and has the same or similar effects of the Walkers Bay site. However, it could also be read as contemplating a full effects assessment of an alternative opening location.

23. If this level of flexibility is still pursued by the Applicants, the condition should be revisited to identify what the risk assessment is assessing (i.e., confirmation of effectiveness of the alternative opening location, not a full effects assessment) and to clarify what standards the alternative opening location must be certified as achieving.

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[8] Application at 3.1, 3.2 and 3.3.7.

[9] *Royal Forest and Bird Protection Society Inc v Gisborne District Council* [2013] NZRMA 336 (EnvC), at [88]

24. Alternatively, the Applicants may wish to consider whether flexibility for opening along the entire coast is required, or if opening at three identified locations is sufficient (as some parties understood was the case).

Property values and compensation

25. The Panel has requested submissions on the relevance of effects on property values.

26. It is a well-established principle that effects on land and property values are not, in themselves, a relevant consideration – effects on property values are generally considered a proxy for other adverse effects (including amenity effects). In *City Rail Link Limited*, the Environment Court held:[10]

> Adverse effects on land and property values are not in themselves a relevant consideration, but if they occur, they are simply a measure of adverse effects on amenity values.
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> If property values are reduced as a result of activities on adjoining land, the devaluation would reflect the effects of that activity on the environment. The correct approach is to consider those effects directly rather than market responses because the latter can be an imperfect measure of environmental effects.

27. There are other difficulties with assessing effects on property values, including the subjectivity of valuation evidence (where actually provided), and that separately considering valuation effects from the factors that cause them leads to double counting of effects.[11]

28. The Panel has also requested submissions on whether it can impose conditions requiring the Applicants to provide compensation to affected landowners.

29. Since 1995, case law has recognised that the RMA is concerned with the management of effects to achieve sustainable management, not with the assessment of compensation.[12] More recent cases have found that conditions requiring compensation would be akin to "financial contributions", which can only be imposed in particular circumstances (and would generally be inappropriate).[13]

30. To impose a condition, the requirements of section 108AA must be met, as well as the *Newbury* tests. In my submission, imposing a condition requiring payment of compensation to landowners is unlikely to satisfy those requirements, particularly in the circumstances of this application and the submissions above regarding the "environment". If the Applicants were to

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10 *City Rail Link Limited v Auckland Council* [2017] NZEnvC 204 at [62]-[63].

11 *Foot v Wellington City Council* (W73/98), 2 September 1998, at [254]-[255].

12 *Colonial Homes Ltd v Queenstown Lakes District Council* [1995] ELHNZ 281 (PT).

13 *Skyline Enterprises Ltd v Queenstown Lakes District Council* [2017] NZEnvC 124.

volunteer compensation, the Panel could take that into account when assessing the effects of the application, however, it cannot impose its own compensation condition in the circumstances.

Environment Southland's functions and the SCRCA

31. Federated Farmers has argued that Environment Southland's functions under the RMA, the SCRCA and the Local Government Act 2002 (**LGA**) mean that greater consideration should be given to adverse effects on flood control works.

32. Respectfully, this novel argument is a red herring.

33. First, while Environment Southland has a range of statutory functions and powers, this application process is not an inquiry into the performance of those functions. While section 104(1)(c) of the RMA allows the Panel to take into account "any other matter [it] considers relevant and reasonably necessary to determine the application", it is difficult to see how the performance of Environment Southland's wider RMA, SCRC and LGA functions is relevant or necessary to determine the application.

34. If it were otherwise, there would be difficult issues in terms of the rule of law – the Applicants would be held to a higher standard than another applicant seeking consent for the same proposal, simply due to Environment Southland's participation.

35. Furthermore, Environment Southland's functions and powers under legislation will remain, regardless of the Panel's decision on the application. As section 23(1) of the RMA provides:

> Compliance with this Act does not remove the need to comply with all other applicable legislation and other rules of law.

36. Federated Farmers' argument relies on a finding that the Waituna Lagoon itself is flood control works. Ms Cook-Munro has confirmed by email that she has not found any documentary basis for saying the Lagoon forms part of a flood control scheme. The maps associated with the Southland Flood Control and Drainage Management Bylaw include the Waituna Creek, but not the Lagoon. Ms Cook-Munro refers to Policy 34 of the Proposed Southland Water and Land Plan as indicating that wetlands assist with flood control:

> **Policy 34 – Restoration of existing wetlands, the creation of wetlands and riparian planting**
>
> Recognise the importance of wetlands and indigenous biodiversity, particularly their potential to improve water quality, offset peak river flows and assist with flood control, through encouraging:
>
> 1. the maintenance and restoration of existing natural wetlands and the creation of new wetlands; and

> 2. the establishment of wetland areas and associated indigenous riparian plantings, including on farm, in subdivisions, on industrial sites and for community sewerage schemes.

37. That Policy is a general statement of the function that wetlands can serve, not confirmation that all wetlands in the Southland Region are flood control works.

38. Federated Farmers have argued that the historic treatment of the Lagoon, including Environment Southland's use of emergency works powers indicate that the Lagoon is flood control infrastructure. In my submission, the opposite is true. If the Lagoon were being managed by Environment Southland as flood control infrastructure, it would not rely on emergency works powers to do so – it would be problematic to rely on powers only available in exceptional circumstances to manage such infrastructure.

39. In terms of effects on flood control works, the Panel can consider the effects of the application on the Waituna Creek drainage scheme. However, any such effects would need to be considered in respect of the "environment" as outlined above.

40. Finally, a question was raised on the first day of the hearing whether any authorisations or approvals were required for the application under the SCRCA or the Bylaw. None are required (but if they were, that would be a matter for the Applicants, separate from the current application).

Emergency works powers

41. The Panel has requested submissions on whether, if consent is declined, Environment Southland could rely on emergency works powers in the future (or if the effects would be foreseeable and therefore emergency works powers not available).

42. Section 330 of the RMA provides the core test for emergency works. Relevantly, it provides:

> (1) Where—
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> (a) any public work for which any person has financial responsibility; or
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> (b) any natural and physical resource or area for which a local authority or consent authority has jurisdiction under this Act; or
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> …
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> is, in the opinion of the person, authority, … affected by or likely to be affected by—
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> (d) an adverse effect on the environment which requires immediate preventive measures; or
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> (e) an adverse effect on the environment which requires immediate remedial measures; or

(f) any sudden event causing or likely to cause loss of life, injury, or serious damage to property—

> the provisions of sections 9, 12, 13, 14, and 15 shall not apply to any activity undertaken by or on behalf of that person, authority, … to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency.

(1A) Subsection (1) applies whether or not the adverse effect or sudden event was foreseeable.

…

43. Section 330 was amended in 2005 to add subsection (1A) to clarify that section 330 could be used to respond to adverse effects or sudden events, even if they were foreseeable. This was in response to a 1998 Environment Court decision where the Court faced arguments that section 330 could not be used for foreseeable events.[14] The Court held:[15]

> We return to the form of the Council's proceedings as earlier set forth; also to Mr Cone's summary of the main issues of concern to the Council. In considering the various matters raised, we have embarked on a full discussion and analysis of s 330 and cognate provisions. We consider that the questions posed are effectively dealt with and answered within the body of our decision. We simply reiterate that even where conditions which give rise to the elements that form the emergency for the purposes of s 330(1) or (2) could have been foreseen, or indeed were foreseen, the person or body may still rely upon the provisions of the particular subsection sought to be invoked, provided that the relevant qualifying aspects (earlier discussed in relation to each subsection) are met.

44. In short, under section 330(1A) and case law, emergency works powers remain available if the required tests in subsection (1) are met, despite the potential effects on the Lagoon being foreseeable.

Other matters

45. To assist the Panel, brief responses are provided on two other legal matters:

(a) Wetland delineation: Ms Sannazzaro suggested that the application is deficient for failing to undertake a wetland delineation under the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**). Such a delineation is only required in accordance with a regional council's mapping function under the NPSFM 2020, which is not required to be completed until 2030. For the application, the definition of natural inland wetland applies (which uses the RMA definition, with exceptions). In any event, it is difficult to understand the relevance of this argument for the application – the Applicants have sought the necessary consents under the NES-F and assessed effects

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14 *Auckland City Council v Minister for the Environment* (1998) ELRNZ 1 (EnvC).

15 At 18.

on the basis that the Lagoon and its margins are a wetland (i.e., the more conservative approach).

(b) Arguments have been advanced that the application should be declined or granted only for a short term, pending the establishment of outcomes and limits for the Waituna Freshwater Management Unit (**FMU**). The FMU process in Southland is on hold as a result of the Resource Management (Freshwater and Other Matters) Amendment Act 2024, which prevents regional councils notifying freshwater plan changes before the NPSFM 2020 is replaced or 31 December 2025. It has recently been announced that the December 2025 date will be extended to December 2027.[16] There is little certainty when the FMU process will be completed. In any event, the outcome of the FMU process will drive changes to resource consents, not the other way around.

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[16] Plan Stop – Fact Sheet, Ministry for the Environment, July 2025.